

IN THE MATTER OF
THE BREITBART INSTITUTE OF PHYSICAL CULTURE,
INCORPORATED

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 1609. Complaint, Apr. 24, 1929—Decision, Sept. 21, 1931

Where a corporation engaged in the sale of a course of physical culture, together with its so-called "Muscle Building Apparatus" for use in the fourth and subsequent lessons, and essential therefor,

- (a) Set forth names of nationally known athletes in advertisements of its course with such statements as "It's easy the Breitbart way. The methods used by the world's champions will also do the trick for you", and employed photographs of well-known athletes and of other persons showing exceptional physical development resulting from the practice of physical exercises, as illustrative of benefits conferred by said course, and published written statements by aforesaid individuals ascribing their physical development to its exercises, notwithstanding fact that some of the world's champion athletes referred to attained their physical development and condition entirely apart from any knowledge or practice of its lessons or apparatus, and many others either owed their physical development in no degree to said course or exercise or in part to instructions received elsewhere; with the tendency and capacity to mislead and deceive members of the public into believing that the individuals thus depicted had accomplished their physical development through physical exercises performed pursuant to its said course, and into purchasing the same in reliance upon such mistaken belief, and with effect of so doing;
- (b) Featured and depicted in its advertisements a number of nationally known athletes as composing its so-called Advisory Council and represented its said course as built around said council and said athletes as giving their personal attention and interest to the course concerned and to the individual cases of the different pupils, and represented one of said council, whose signature as physical director it affixed to letters, form letters, lessons, etc., as being a famous athlete, trainer, and outstanding authority on physical education and corrective exercise, and as being its athletic director, having personal charge and supervision of its course, notwithstanding the fact that the central figure depicted in the representation of such council had died prior to said corporation's organization, and said trainer, etc., and the others included never received any compensation from it and had no connection whatever with it or its course other than consenting to use of their names and photographs as members of said so-called council; with the capacity and tendency to mislead and deceive members of the purchasing public into believing that as subscribers to such course they and their individual cases would have the benefit of the skill and experience of the famous athletes composing such supposed Advisory Council;
- (c) Included in its corporate name the name of a former widely known "strong man" and professional athlete who had himself formerly conducted under his own name a course in physical training and depicted

aforesaid council grouped about said deceased athlete and included his name in connection therewith, and affixed his signature to checks purporting to be his personal checks, represented as payable at his place of business, and sent to prospective subscribers for their use as credits against its regular price; with the capacity and tendency to mislead and deceive members of the public into believing aforesaid well-known athlete and strong man to be still alive and taking a personal and active interest and part in the business concerned and in the instruction given to purchasers of its course, and to induce their purchase thereof in reliance upon such mistaken beliefs;

- (d) Represented the price expected to be received and received as a sum less than that actually charged, through exacting prices in excess of the sum mentioned in letters and enrollment blanks, upon the ground of covering transportation charges on its aforesaid "Muscle Builder", notwithstanding the fact that said letters, etc., stated that the figures therein mentioned and agreed to by the pupil or subscriber covered everything and that "*The original cost is the last*. You do not have to spend another cent for anything else; the course is complete including the Breitbart Progressive Muscle Builder * * *" and subscribers had made all payments called for by said letters, etc., and delayed delivery of said apparatus and the fourth and subsequent lessons for periods ranging from a week or more to more than a year due to the making of such demands, purchasers' objections thereto, and the lapse of time brought about in the making of adjustments and remittance of the charges when finally accepted; with the tendency and capacity to mislead and deceive purchasers into believing that aforesaid sums constituted its real price for the course and apparatus, and included charges for transportation thereof, leaving nothing more to be paid, and into purchasing said course in reliance upon such erroneous belief; and
- (e) Falsely represented and offered said course as requiring about three months to complete, in weekly lessons, fact being it delayed delivery of the fourth and subsequent lessons and the necessary "Muscle Builder" for periods ranging from a week to a year or more, due to failure to keep on hand a sufficient number of such devices for delivery in due course, though manufacturers of necessary parts were in a position at all times to make delivery to it of sufficient quantities to fill all its requirements within from four to six weeks, and purchasers or subscribers had paid all money required to entitle them to delivery of said apparatus; with the tendency and capacity to mislead and deceive purchasers into believing that it was able and willing at all times to deliver its course and apparatus so as to permit completion in about three months at the rate of a lesson a week, as represented, and into buying such course and apparatus in reliance upon such mistaken belief, and with the effect of so doing; and of depriving purchasers in a great number of instances not only of the use and benefit of said course beyond the fourth lesson, and of such apparatus for aforesaid periods, but also during such times of the benefits of instruction in the performance of physical exercises pursuant to competitors' courses, purchase of which they were prevented from making due to having bought course herein concerned; With the tendency and capacity to divert trade and with the effect of causing trade to be diverted from its competitors, and causing competitors to be otherwise injured:

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Held, That such practices, under the conditions and circumstances set forth were to the prejudice of the public and competitors and constituted unfair methods of competition.

Mr. Edward E. Reardon for the Commission.

Mr. Morris Meyers and *Mr. Samuel Meyers*, of New York City, for respondent.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, a New York corporation engaged in the sale of a book of instructions for the performance of physical exercises for the development of the body, and of a certain appliance for use in performing certain of its said exercises, and with principal place of business in New York City, with misrepresenting business status, affiliations, and service, using false and misleading testimonials, offering deceptive inducements to purchase and advertising falsely or misleadingly, in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, engaged as above set forth, in offering its course to the public by means of letters and advertisements in newspapers represents that there is affiliated with its book or course a so-called Advisory Council consisting of prominent athletes, mentioning such names as Tex O'Rourke, Jack Dempsey, and Doctor Roller, who meet daily and give their attention to the problems presented, making available their advice and supervision to the pupils, the fact being that the so-called council does not meet at any time as such, the individual members do not confer with one another with reference to the exercises or instruction, and most of them have had nothing to do with the book or course of instructions or advice to subscribers or purchasers thereof.¹

Respondent further, as charged, published alleged recommendations of its book or course including pictorial representations from alleged purchasers or subscribers attributing their physical development to the performance of the physical exercises prescribed in the book or course, the fact being that the persons concerned had already accomplished their development as a result of exercises previously received from sources other than respondent; delivered to subscribers and purchasers of its course offered at time to time at special prices, less than the full course and an appliance of less effectiveness in value than that represented as a part of this special

¹ Certain representations of respondent relative to the Advisory Council, alleged in the complaint, appear below in the "Findings," at p. 221.

offer, refusing in some cases to deliver the appliances referred to, in others to deliver any appliance whatever and in still other instances refusing to send or unreasonably delaying the sending of the course or appliance; and in connection with special offers of the book or course sent prospective subscribers, or purchasers, checks purporting to be the personal checks of Siegmund Breitbart payable at respondent's place of business in New York as part payment of the price of the book or course, the fact being that the individual in question was deceased long before the time that such use was made of the checks in question purporting to have been signed by him.

According to the complaint the aforesaid acts and things "have the tendency and capacity to mislead and deceive members of the public; into the belief that an Advisory Council of prominent athletes, experienced in the performance and practice of physical exercises, take an active and personal part in preparing and supervising the lessons or instructions sold by respondent, in book form or as a course of instruction, with the object of suiting particular exercises and instructions to the needs or requirements of individual purchasers or subscribers; into the belief that the persons, whose pictures of their physical development and whose recommendations of respondent's said book or course are published by respondent, have received the physical development represented in such pictures and recommendations by reason of having bought respondent's said book or course of instructions and having performed the physical exercises contained in said book or course at the instance of respondent; into the belief that purchasers of or subscribers to respondent's said special offers of its said book, or course of instructions, at said special and lower price than the regular price would receive the same book or course of instructions and the same apparatus or appliance that they would receive if they paid the said regular price; into the belief that Siegmund Breitbart, deceased, was actually alive, personally connected with respondent's organization, issuing checks to be used as a cash credit in payment of respondent's said book or course and otherwise taking a personal interest in the purchasers or subscribers to respondent's said book or course of instructions; and, relying upon such belief, into purchasing or subscribing to respondent's said book or course of instructions in preference to the books or courses of instructions offered and sold to the public by respondent's competitors"; all to the injury and prejudice of the public and respondent's competitors.

Upon the foregoing complaint, the Commission made the following

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REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress approved September 26, 1914 (38 Stat. 717), the Federal Trade Commission issued and served a complaint upon the respondent, The Breitbart Institute of Physical Culture, Inc., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act.

The respondent having filed its answer herein, hearings were held and evidence was thereupon introduced on behalf of the Commission and of the respondent before an examiner of the Federal Trade Commission duly appointed.

Thereupon this proceeding came on for a final hearing on the brief for the Commission, and counsel for the respondent having waived the filing of a brief and oral argument having been waived by counsel for the Commission and for the respondent, and the Commission having duly considered the record and being fully advised in the premises makes this its findings as to the facts and conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, The Breitbart Institute of Physical Culture, Inc., is a corporation organized November 2, 1925, under the laws of the State of New York, and at all times since the date of its organization it has had and now has a place of business in the City of New York in said State.

PAR. 2. During all the times above mentioned the respondent has been and now is engaged in the business of the sale of a course of instruction consisting of 12 lessons in the performance of physical exercises for the physical development of the human body and its parts called Breitbart Physical Culture Course for Health, Strength, Muscle.

PAR. 3. The respondent includes with, and as part of, its said course of instruction an appliance consisting of two or more steel leaves with steel handles, the handles being finished with hard rubber grips. The appliance is called a Muscle Building Apparatus, and was and is designed and intended by respondent to be used by the purchasers of or subscribers to its course in connection with the performance by them of the exercise prescribed in the fourth, and subsequent lessons.

The balance of the lessons of respondent's course after the third lesson are useless to a subscriber or purchaser of the course without the Muscle Building Apparatus, as all of the exercises in the fourth and subsequent lessons of the course are to be done with the use of the apparatus.

PAR. 4. During all the times above mentioned the respondent has offered its course of lessons, including therewith its said Muscle Building Apparatus for sale by means of advertisements which respondent has caused to be published in newspapers and magazines and circulated among the public throughout the various States of the United States and in foreign countries and by means of letters and printed pamphlets, books and circulars sent by respondent from the State of New York through the United States mails to various members of the public, prospective purchasers, located in States other than New York, in the District of Columbia, and in foreign countries.

PAR. 5. During all the times above mentioned the respondent has sold its said course of lessons and apparatus to members of the public, purchasers thereof, located in foreign countries, in the District of Columbia, and in the various States of the United States other than the State of New York, and it has caused its course of lessons and apparatus when so sold by it to be transported from the State of New York to, into and through States other than New York, to the District of Columbia and to foreign countries, and delivered to the said purchasers.

PAR. 6. During all the times above mentioned other individuals, firms, and corporations, hereinafter called sellers, located in the various States of the United States have been engaged in the business of the sale of courses of instruction in physical exercises for the development of the human body and its parts to members of the public, purchasers thereof, located in the said various States other than the State of the respective sellers, in the District of Columbia and in foreign countries, and the said sellers, respectively, have caused their said courses of instruction when so sold by them to be transported from the State of the seller or the State of origin of the shipment, to, into and through States other than the State of the seller or the State of origin of the shipment to the District of Columbia and to foreign countries to the said purchasers.

The respondent during the times above mentioned has been and still is in competition in interstate and foreign commerce with said other individuals, firms, and corporations in the business of the sale of its course of lessons including its said apparatus.

PAR. 7. Prior to the organization of the respondent corporation there was a corporation in existence in the State of New York, engaged in the business of the sale throughout the United States of a course of instruction in the performance of physical exercises for the physical development of the human body, under the name, Siegmund Breitbart, Inc., of which one Siegmund Breitbart was the president. The said Siegmund Breitbart was in his lifetime a pro-

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professional athlete, and before his death he was widely known and advertised among the public of the United States and in foreign countries, as a "strong man" by reason of his ability in lifting or moving heavy weights and performing athletic feats that particularly required unusual muscular development and strength.

PAR. 8. Siegmund Breitbart, above mentioned, died in the latter part of the month of October, 1925, and the respondent was almost immediately thereafter organized as a corporation on November 2, 1925, and engaged in business as above stated.

PAR. 9. One Frederick S. Engel, residing at 604 West One hundred and twelfth Street, New York City, was one of the promoters of the organization of respondent corporation. The said Engel has been manager of respondent's business at all times since its organization.

The only regular employees of respondent during 1928, 1929, and 1930 were the said Frederick S. Engel, president and manager of respondent's business, one female clerk who received \$25 a week for her services and during 1929 another female clerk who received \$25 per week.

PAR. 10. The respondent, in the usual course of its business, caused advertisements referred to in paragraph 4 hereof to be published in magazines as above set forth, in which, among other things, the names of a number of nationally known athletes were mentioned in connection with statements, among others, as follows:

It is easy the Breitbart way

The method used by the world's great champions

will also do the trick for you.

These advertisements also contained many general statements concerning the benefits of physical exercises, and sometimes exhibited the photographs of nationally known champion athletes.

The said advertisements were made by respondent for the purpose of soliciting inquiries from the public for further free literature. The respondent offered in said advertisements to send free by mail its 84-page book entitled "Muscular Power", to those who sent in their names and addresses on a coupon attached to the advertisement for that purpose.

PAR. 11. The respondent sent to those who answered its advertisements referred to in paragraph 10 hereof, its said book, Muscular Power.

Respondent's said book contains among other things a description of respondent's course of instruction and its said muscle-building apparatus.

The said book also contains a group photograph composed of the photographs of six nationally known athletes, including four former

national champions in the professional athletic sports of boxing, pugilism, and wrestling, and a photograph of a nationally known matchmaker and promoter of professional contests in boxing, pugilism, and wrestling, grouped around a photograph of said Siegmund Breitbart, who is dead.

The group photograph of said eight individuals is entitled "Breitbart Advisory Council."

PAR. 12. Among the statements made by the respondent, contained in its said book, *Muscular Power*, are the following:

The Advisory Council became the head and heart of the Breitbart Institute. Every day the different problems are gone over and every pupil gets real consideration and attention. One good head is not as good as eight good heads—so figured Breitbart, and on that theory he got the Advisory Council imbued with his method and secrets, so that to-day it functions smoothly, efficiently, and harmoniously, producing such marvelous results that the testimonials from thousands of Breitbart pupils keep coming in a constant stream more wonderful and more astounding than could be imagined.

* * * * *

Suppose Tex O'Rourke, Jack Dempsey, Dr. Roller—the whole Breitbart Advisory Council—went to your house every day for a few weeks to instruct you how to build up your health, strength, muscles, and vitality, giving you their best knowledge, experience, and instructions, divulging their numerous secrets on training and body development, would this be worth the price of the Breitbart course? Yes, indeed; it would! Well! That is just what you get when you enroll for the Breitbart course—you get the advice of the greatest aggregation of the master minds of muscle ever gathered together in one enterprise since the world began.

Among other statements made by respondent to purchasers and prospective purchasers of its said course were the following:

Breitbart pupils get personal supervision from the very start to finish. Each lesson is designed to the pupil's individual needs and requirements and for his own particular benefit. All correspondence, lessons, and letters are carefully read. The pupil gets the wonderful course in physical education under personal direction of the Great Advisory Council all the time, right in the privacy of the home, just as if they were present personally talking to each pupil and telling him what to do.

PAR. 13. After the respondent sent its book, *Muscular Power*, to members of the public as above set forth, it sent follow-up letters to those who did not immediately send respondent their enrollment or subscription to its said course of instruction. The said follow-up letters contained, among others, statements as follows:

I have been watching the mails for your enrollment but as yet it hasn't come in * * *.

Here's an opportunity you can't afford to pass up! You'll always be glad you enrolled for the Breitbart System because you're going to get great results under the guidance of the famous Breitbart Advisory Council—all World's Champions and Internationally famous Physical Culture experts and authorities.

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PAR. 14. In form letters to prospective subscribers or purchasers the respondent made statements regarding the said Advisory Council, the course, the period of time the course would require, and the interval of time in which the lessons would be sent to them by respondent, among others, as follows:

The Breitbart Advisory Council of the World's leading authorities assures you positive results from the very start. * * *

A course will be outlined for you which will cover a period of about three months. * * *

During this period you will receive one lesson each week, consisting of a set of progressive exercises * * *.

PAR. 15. The business of respondent in the sale of its said course of instruction to members of the public mentioned and referred to above, the said purchasers of said course during the times above mentioned, was a personal service rendered or to be rendered said purchasers on the part of respondent and those of respondent's agents and employees including the said Breitbart Advisory Council and said Tex O'Rourke, under whose personal charge and supervision respondent represented that its said course of instruction was given.

PAR. 16. The respondent represented that said Tex O'Rourke named as one of its said Advisory Council was a noted athlete and trainer and an outstanding authority for years on physical education and corrective exercises and that he was the athletic director of respondent in charge of the assignment of its lessons and instructions for the performance of exercises in its said course of instruction.

The assignment of lessons of respondent's said course to purchasers thereof and the instructions to them for the performance of the exercises in said course was not done by the said Tex O'Rourke but by the said Engel who had charge of and directed the course of instruction and gave the instructions to the said purchasers of said course for the performance of the exercises thereof and signed the name of said Tex O'Rourke to all correspondence of respondent with its said purchasers 'concerning the instructions of its said course.

PAR. 17. During all the times aforesaid, all correspondence on the part of respondent with purchasers and prospective purchasers or subscribers to respondent's course of instruction, including that in which instruction concerning the course and physical exercises referred to therein was given to purchasers or subscribers has been conducted, on respondent's part, and answered by the said Engel or by the said female employee under his direction. All form letters sent by respondent to purchasers or prospective purchasers were usually signed by said female employee by stamping them with the

facsimile of the signature of one Tex O'Rourke as physical director. All other said correspondence of respondent was usually signed by said Engel with the name Tex O'Rourke, as physical director.

PAR. 18. Some of the world's champion athletes whose names were used in respondent's advertisements, mentioned and referred to in paragraph 10 hereof, to the knowledge of respondent and its said president and manager, Frederick S. Engel, never received any instruction from respondent and have never practiced any exercises for their physical development pursuant to respondent's said course of instruction or by means of respondent's said Muscle Builder Apparatus.

Said world's champions attained all of their physical development and condition entirely apart from any knowledge of or practice in lessons or exercises contained in respondent's said course of instruction, all to the knowledge of respondent and to the knowledge of its said president and manager, Frederick S. Engel.

PAR. 19. The individuals represented by respondent as forming the said Breitbart Advisory Council, excepting Siegmund Breitbart who was dead, gave their consent, respectively, to the use of their names and photographs as members of the said Breitbart Advisory Council and further than giving their consent to such use of their names and photographs they never had any connection with the respondent's said business, or with respondent's said course and never consulted together regarding respondent's lessons to the subscribers to or purchasers of respondent's said course. The said individuals never either individually, or one or more of them collectively, supervised any of the lessons or any instruction given by respondent or proposed to be given by respondent to any of the subscribers or prospective subscribers or to any of the purchasers or prospective purchasers of the respondent's said course of instruction.

The said individuals never individually or collectively received any compensation from respondent for the said consent to the use of their names and photographs or for any other account whatever.

The said Breitbart Advisory Council, during all the times above mentioned, to the knowledge of respondent and of said Engel was and is a council in name only.

PAR. 20. During all the times above mentioned the respondent published in its said book, Muscular Power, photographs of certain individuals that exhibited the degree of their physical development to be much greater than in the case of the average person and to be the result of the practice of physical exercises. Many of the said photographs were of well-known athletes and their physical development as shown in the said photographs was, in some instances not due in any degree to respondent's course of instruction or the per-

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formance of any exercises by said individuals pursuant to respondent's said course of lessons. In certain other instances the physical development of others of the said individuals as shown in the said photographs was partly the result of physical exercises performed by the said individuals pursuant to instructions received from others and was not due as to such part of their said physical development in any respect or degree to respondent's course of instruction or the performance by said individuals of any exercises pursuant to respondent's said course of lessons.

The said photographs published as aforesaid were representations that the physical development exhibited therein was accomplished by means of respondent's said course and the publication of the said photographs by respondent was for the purpose of recommending to members of the public respondent's course of instruction and to induce and persuade members of the public to purchase or subscribe to respondent's course of instruction for the price in money at which the course was offered to them by the respondent. The said recommendations of respondent's course of instruction by means of photographs of the physical development of individuals who are and have been represented by respondent to have obtained their said physical development in consequence of instruction contained in respondent's course have been published not only in respondent's book, *Muscular Power*, but they have also been published in newspapers and magazines, including those newspapers and magazines mentioned and referred to in paragraph 4 hereof.

The respondent has also included in its advertisements in newspapers and magazines written statements which have represented that the physical development of the said certain individuals was the result of exercises performed pursuant to respondent's said course, when in fact the physical development of such individuals had already been brought about either partly or wholly by the performance of physical exercises by said individuals which were performed by them pursuant to instructions received from others than respondent.

PAR. 21. During the times above mentioned the respondent has from time to time offered its said course for sale to the public at special prices lower than the said regular prices and in connection with its said special offers of its course, the respondent has sent to prospective purchasers thereof checks purporting to be the personal checks of said Siegmund Breitbart, who was deceased at the time, and purporting to be signed with his signature and payable in money at Siegmund Breitbart, Inc., in New York City. The said checks were sent by respondent to be used by the said pur-

chasers or subscribers as credit for part payment in money for respondent's said course.

PAR. 22. In respondent's letters, mentioned and referred to in paragraph 13 hereof, to prospective purchasers of its course of instruction the respondent during the times above mentioned and referred to stated regarding the price of its course of instruction, among other things, as follows:

All you are asked for the Complete Course and wonder-working apparatus is \$25 cash or \$29 on the part payment plan. \$5 down and the balance \$3 weekly; either way is agreeable.

At the end of the said follow-up letters sent by the respondent was a form for enrollment as a subscriber as follows:

BREITBART INSTITUTE OF PHYSICAL CULTURE, 3 EAST
14TH STREET, NEW YORK CITY, N. Y.

I hereby enroll as your pupil and want you to send me your COMPLETE COURSE together with your progressive MUSCLE BUILDER apparatus, and here-with make payment of \$25 in FULL or \$5 in part payment, the balance to be paid at the rate of \$3 weekly until the full amount of \$29 is paid.

Name_____ Date_____
City_____ State_____

Please underline the payment you wish to make.

A copy of the above form for enrollment was also contained in respondent's book, Muscular Power, and on the page in said book immediately before the pages occupied by the said enrollment blank the statement, among others, appeared as follows:

The original cost is the last. You do not have to spend another cent for anything else; the course is complete, including the Breitbart Progressive Muscle Builder * * *.

PAR. 23. The respondent's said course of instruction was designed and intended by respondent and, during the times above mentioned was offered by respondent to purchasers or subscribers, members of the public, to cover a period of instruction in the lessons of the course of about three months, during which time subscribers to or purchasers of the course were to receive from respondent one lesson a week beginning with their subscription or purchase of the course and said apparatus.

During all the times mentioned and referred to herein the respondent sold its said course and apparatus to members of the public, purchasers thereof and the said purchasers bought the same on the said representations of respondent and on the understanding and agreement between respondent and said purchasers, respectively, that the respondent's said course would take about three months to complete; that respondent would send said purchasers one lesson of the course each successive week beginning with the purchase of the

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course; that respondent would send its said apparatus to said purchasers with the fourth lesson of said course, and that the price of said course and apparatus included no further cost in money to said purchasers than the amount stated by respondent which did not include any charge for delivering the lessons of the course or said apparatus by mail or otherwise to said purchasers.

PAR. 24. The respondent represented to purchasers that the price of its said course and apparatus was the price which was stated by respondent to said purchasers and subscribers on its said enrollment forms or its said special prices mentioned and referred to respectively in paragraphs 22 and 21 hereof.

During the times above mentioned, in those instances where it had received payment in cash in full from the purchaser with his order or subscription for its course, and also in those instances where respondent had sold its complete course and apparatus to purchasers or subscribers on the partial payment plan, and from whom the respondent had received the sums agreed upon for the part payment and the weekly payments due at the time respondent was to send the fourth lesson of its course and its said apparatus to purchasers or subscribers, the respondent made it its usual and regular practice to demand and receive from each of the said purchasers or subscribers, respectively, a further sum of money for the charges of transportation of the said Muscle Builder Apparatus to them by mail or otherwise, before it would deliver the apparatus or further lessons due.

The true price of respondent's course to purchasers or subscribers included and was always intended by respondent to include, without knowledge thereof by said purchasers or subscribers, charges for delivering its said apparatus to purchasers throughout the United States and in foreign countries by mail or otherwise.

PAR. 25. Among the parts of which respondent's said Muscle Builder Apparatus was made were certain tempered steel leaves and the respondent did not have sufficient of the said steel leaves during the years 1928, 1929, and 1930 with which to assemble its said Muscle Builder Apparatuses in sufficient quantity to supply the said purchasers of its course during those years, and in consequence thereof respondent did not have sufficient of said apparatuses for that purpose during said times.

On November 18, 1930, the date of the last day of the taking of testimony in this proceeding, there were, among others, 76 persons who had bought from respondent its said course of instruction, including S. B. Singh, Chief Justice of Jind State, India, who subscribed for the said course in September, 1929, all of whom had paid respondent in full the amount of the purchase price or

subscription for its said course and all of whom, with the exception of the said Chief Justice Singh, had subscribed for or purchased respondent's said course at various times during the period from February 14, 1930, to said November 18, 1930.

None of the said 76 purchasers had received respondent's Muscle Builder Apparatus and substantially all of them had received only three lessons of respondent's course of instruction on said November 18, 1930, notwithstanding substantially all of said purchasers had demanded of respondent delivery of its said Muscle Builder Apparatus long prior to said last mentioned date and in accordance with the terms of their contract of purchase respectively of respondent's said course and apparatus.

PAR. 26. Manufacturers in the United States of the steel leaves mentioned above, used by respondent as parts of its said apparatus, are and have been able during all the times above mentioned to make and deliver to respondent in from four to six weeks after receipt of an order from respondent said steel leaves in sufficient quantity to fill all the requirements of respondent for said steel leaves for its Muscle Builder Apparatuses.

PAR. 27. During the times above mentioned respondent has failed to deliver its said apparatus or any lessons of its said course subsequent to the third lesson to many of the purchasers or subscribers of its said course, mentioned and referred to in paragraphs 24 and 25 hereof, notwithstanding said purchasers or subscribers had paid in full within the time for delivery to them of the apparatus and the fourth lesson of said course all sums of money due therefor including in addition the amounts demanded by respondent from said purchasers for the transportation charges on the delivery of the said apparatus to the said purchasers.

PAR. 28. During the times above mentioned respondent has failed to deliver and has delayed delivery of the fourth and subsequent lessons of its course and of its Muscle Builder Apparatus, to purchasers which was necessary to be used by them with the fourth and subsequent lessons, for periods of time varying from a week or more to more than a year because respondent did not obtain and have sufficient apparatuses during said times for delivery thereof with the fourth lesson which was regularly due to be furnished to said purchasers within approximately four weeks after they had bought respondent's course.

During the times above referred to, the delivery of the fourth and subsequent lessons of its course and the delivery of said apparatus has been delayed for similar periods of time because of respondent's demands for the payment by purchasers of transportation charges

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in advance of delivery of the Muscle Builder Apparatus, and the consequent lapse in the time of delivery of said lessons and apparatus caused by respondent's demands, by the objections of purchasers to them, and for adjustments thereof and the remittance of the amount to respondent of said charges when finally accepted by the purchasers.

Purchasers of respondent's said course in consequence of the failure of respondent to deliver the said apparatus and lessons as above set forth were in a great number of instances during said times deprived not only of the use and benefit of respondent's said course beyond the fourth lesson and of the use of respondent's Muscle Builder Apparatus for periods of time varying from a week or more in some instances to more than a year in others, but they were deprived thereby for such periods of time from the benefits of instruction in the performance of physical exercises pursuant to courses of such instruction sold by competitors of respondent which they were prevented from buying because of the purchase of the course sold by respondent.

PAR. 29. The representations of respondent, above set forth, by means of the use of the checks for the payment of money purporting to be signed by Siegmund Breitbart, deceased, which were given by respondent to purchasers as credits for payment by them on the price of the course, and by means of the use of photographs published in respondent's said advertisements representing Siegmund Breitbart, deceased, as a member of its said Advisory Council, to the effect that said Siegmund Breitbart, deceased, a former well-known athlete, was a living person and was taking a personal and active interest and part in the business of respondent and in the instruction given to purchasers of its course; and the representations of respondent, above set forth, by means of the use of group photographs of certain well-known athletes, entitled Breitbart Advisory Council, which included the photograph of the dead Siegmund Breitbart, that respondent's course of instruction was given to purchasers under the personal, actual and active interest of the members of said council were each and all false representations on the part of respondent, and the said representations had the tendency and capacity to mislead and deceive members of the public into the belief that said representations were each and all of them true, and in reliance in that belief into purchasing respondent's course of instruction.

PAR. 30. The representations above set forth, by the use of photographs in advertisements of respondent in connection with the sale of its course of instruction, showing the physical development of certain persons together with statements contained in said adver-

tisements to the effect that said persons had obtained their physical development pursuant to instructions in the performance of physical exercises received from respondent, when in fact the physical development of said persons was not accomplished by means of physical exercises pursuant to any lessons or instructions received by them from respondent or its said course, had the tendency and capacity to mislead and deceive members of the public, purchasers of respondent's said course, and they did mislead and deceive said members of the public during the aforesaid times into the belief that the individuals whose photographs were so published had accomplished their said physical development by means of physical exercises performed pursuant to respondent's course of instruction, and, in reliance upon that belief, into purchasing respondent's course of instruction.

PAR. 31. The statements and representations above referred to made by respondent to purchasers during all the times above mentioned, that certain sums of money were the respondent's prices to them for its course of instruction and Muscle Builder Apparatus when in fact, at the times it sold its said course and apparatus to said purchasers, respectively, the respondent, without notice and without knowledge thereof on the part of the purchasers, secretly, intended to include and did include in the prices for its course and apparatus to said purchasers, respectively, further sums of money for charges of transportation of the apparatus to them, were each and all of them false statements and representations and falsely represented the true, regular and customary prices of respondent's course and apparatus to purchasers.

The said statements and representations had the tendency and capacity to mislead and deceive and they did mislead and deceive purchasers into the belief that the said certain sums were the real prices for the said course and apparatus; that the said prices included and covered charges for transportation of the course and apparatus and that no further sum or sums were to be paid by purchasers for respondent's course and apparatus, and in reliance upon that belief into purchasing the respondent's course of instruction.

PAR. 32. The representations of respondent during the times above mentioned, in offering its course of instruction and apparatus for sale and in selling the same to members of the public as a course to be completed in about three months at one lesson per week, taken in connection with the practice of respondent in failing to deliver the fourth and subsequent lessons of its course and its said apparatus at the times when delivery of the same was due to the purchasers, were each and all false representations that respondent was able and willing at all times to perform its contracts of sale of its course and

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apparatus with purchasers thereof and the said representations had the tendency and capacity to mislead and deceive and they did mislead and deceive purchasers of respondent's course and apparatus into the belief that the respondent was able and willing during all of said times to obtain and to deliver the lessons of its said course and its said apparatus to purchasers thereof, and in reliance upon such belief into purchasing respondent's course of instruction and apparatus.

PAR. 33. The practices and representations of the respondent mentioned and referred to in paragraphs 29 to 32 hereof, inclusive, are and have been unfair methods of competition in interstate and foreign commerce, and they each and all have the tendency and capacity to divert trade, and they each and all have caused trade to be diverted from competitors of respondent and have caused respondent's competitors to be otherwise injured.

CONCLUSION

The practices of the respondent under the conditions and circumstances set forth in the foregoing findings are to the prejudice of the public and of respondent's competitors, and are unfair methods of competition in interstate and foreign commerce and constitute a violation of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes".

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and upon the answer of the respondent filed herein, and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes",

It is now ordered, That the respondent above named, The Breitbart Institute of Physical Culture, Inc., its agents and employees, in the business of the sale in interstate or foreign commerce of printed or written lessons or instruction in the performance of physical exercises for the development of the human body do cease and desist:

1. From representing to the public in the United States and foreign countries by means of photographs and printed or written statements published in advertisements in newspapers, magazines, or other publications or by oral statements or in any other way, that any person or group of persons is connected with or associated with respondent as an advisor or in an advisory capacity or in

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other personal relationship to purchasers of respondent's lessons or instruction in the performance of physical exercises, unless and until such person or group of persons is actually, and in good faith, connected with or associated with respondent and is, in good faith, actually engaged in such advisory capacity or personal relationship to said purchasers to the extent and in the manner represented by respondent.

2. From representing to the said public in any way that Siegmund Breitbart, deceased, is a living person and connected or associated with respondent's said business.

3. From publishing photographs of any person or persons, showing their physical development in connection with the sale of respondent's lessons or instruction in physical exercises, unless such persons have accomplished their physical development pursuant to lessons or instruction in the performance of physical exercises received from respondent, or unless such photographs are accompanied by a statement clearly setting forth the source of the lessons or instruction in physical exercises received and followed by such persons.

4. From representing to the members of the said public in advertisements or in printed, written, or oral statements, or in any other way, that the real, true, regular and customary prices demanded of purchasers and received by respondent for its course and Muscle Builder Apparatus are certain stated sums of money, which sums are exclusive of transportation charges on delivery of the course and apparatus to purchasers, when the real, true, regular and customary prices demanded of purchasers and received by respondent for its course and apparatus includes a further and additional sum or sums for the charges of transportation of the same to said purchasers.

5. From representing in written or printed statements in advertisements or in oral statements or otherwise to the members of the said public that respondent is able to deliver and will deliver its lessons or instruction in physical exercises and its Muscle Builder Apparatus within a reasonable time or within a stated certain or approximate time to purchasers when, at the time such representations are made by respondent, it either does not intend to deliver or it knows or has reasonable grounds for knowing it is and will be unable to obtain and deliver the said lessons or instruction or apparatus to purchasers within a reasonable time or within the said certain or approximate stated time.

It is further ordered, That the respondent, The Breitbart Institute of Physical Culture, Inc., shall, within 30 days after the service upon it of this order, file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which it has complied with the above order to cease and desist.

IN THE MATTER OF
WAUGH EQUIPMENT COMPANY, ARTHUR MEEKER,
FREDERICK W. ELLIS, J. B. SCOTT

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914

Docket 1779. Complaint, Apr. 3, 1930.—Decision, Sept. 21, 1931

Where a corporation engaged in the manufacture of draft gears and in the sale of aforesaid necessary cushioning and shock absorbing devices to railway companies, private car lines, car builders, and others for use on their rolling stock, and including among its large stockholders persons representing important interests in two of the great packing companies; and two individuals, (1) for some thirty years employees of one of said packing companies, and respectively executive vice president, and vice president in charge of traffic, controlling the movement of some 7,000 private cars operated by said packer, and the routing and the allocation of some 275,000 carloads a year, and (2) large stockholders in said corporation through subsequent purchase, and prior agreement to use the influence possessed by them through control of aforesaid traffic in securing favorable reception for said corporation's representatives in soliciting railway companies to purchase its said gears, and in bringing about such purchases;

- (a) Used the volume of traffic of said packing company and/or its subsidiaries, highly prized and eagerly and insistently sought by the railway companies, and controlled as aforesaid, to induce and compel such companies to purchase said corporation's draft gears in preference to competitors' products of equal or higher quality through promising, assuring and shipping traffic of said packing company and its subsidiaries, or of an increased volume thereof, over their lines, and through threatening to withdraw and withdrawing such traffic, contingent upon their purchasing or failing to purchase said products; and

Where the aforesaid general officers,

- (b) Cooperated with and assisted such corporation and its officers, agents and employees in the sale and distribution of said gears and other equipment to railway companies through utilizing their position in said packing company to induce or compel officials of said companies to give undue preference to gears and other railway equipment made and/or sold by said corporation, through promises of traffic from said packing company and/or its subsidiaries, and through threats of withdrawal thereof, should said companies fail to purchase such gears or other equipment;

With the result that sales of said practically unknown gear increased in a few years from less than 1 per cent of those sold for new freight equipment to over 35 per cent and passed those of competitors, and with an undue tendency to suppress competition between aforesaid corporation and its competitors and to create a monopoly in the sale and distribution of draft gears and other railway equipment, through creation and use as above set forth of a coercive and oppressive weapon, preventing customers solicited by it and its competitors from exercising their free will and judgment in determining the most efficient device and that best suited to their needs at the lowest net cost over a period of time, and in the injection thereby of an unfair and abnormal element into the competitive field concerned, tending to reduce efficiency and economy in production and sales methods of